

# legal check up

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lawyers

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Winter Edition 2015

## Slips, trips and tumbles

**When is an occupier of premises legally responsible for a fall? Andrea Tsalamandris explains.**

On the first day of winter, outside our Epping office, an elderly man had a fall. It had been raining heavily and he was catching a taxi home. Unfortunately for him, he missed the step, falling to the ground, hitting his head and most likely breaking his hip. People rushed to his attention and soon enough, ambulance staff were tending to him and taking him to the nearby Northern hospital.

People often joke about personal injury lawyers being ambulance chasers (although of course this is something we have never done!) But on this occasion the accident happened right outside our office. Could we help him? Or were we a possible Defendant? The answer to both questions is no. Legally, neither councils, shopping centres or other occupiers are liable for a person's injuries if it is a simple fall, with no obvious signs of fault. That is, accidents happen.

However some accidents are avoidable. If the step to the taxi rank was made up of broken or crumbling concrete that was hard to distinguish, the shopping centre could be held liable for a tripping accident. If premises have high gloss floors, and it is raining outside, a warning sign would be expected to alert guests



entering the premises.

The High Court has also held that a supermarket with a steady flow of customers, should have regular cleaning inspections, at least every 20 minutes, to ensure there are no slipping hazards.

It is often difficult to know if there is negligence or not. If ever in doubt, the injured person should just ask us. We often assess photographs taken at the time or soon after to determine if there is a basis to establish liability. If so, then we can assist the injured person recover compensation.



### Message from the Editor

We are now truly in the depths of winter with its dark mornings, low temperatures and frosty nights. With all this wet weather comes many slips and trips on slippery surfaces and so we have chosen to answer some of the questions we are often asked by doctors in this season's edition of Legal Check Up.

This winter we are celebrating the promotion of Lauren Freeman to Senior Associate – Lauren works in our city and Epping office and is also a committed and passionate advocate for those who live in north-east Victoria where her family live. We are also celebrating one of our Legal Assistants, Nhu-Thuy Dinh finishing her law degree after many years of hard work. Congratulations to Lauren and Nhu Thuy!

We hope you all manage to stay warm this winter and you are all no doubt kept busy by the colds and flu that this chilly season brings.

*Bree Knoester, Partner*



- Andrea Tsalamandris, Partner

# When medical expenses are recoverable



When someone suffers an injury in a public place, extensive medical attention may be necessary in the immediate aftermath of the incident as well as regular management into the future.

Unfortunately, unlike the WorkCover or TAC system, there is no statutory system that allows someone in these circumstances to claim for medical expenses incurred because of the injury. Medical expenses are still recoverable from the Defendant as long as the injured victim can successfully prove negligence. If they can overcome this hurdle, medical expenses will be paid for at the end of the legal process.

Compensation for medical expenses cover expenses that have already been incurred, as well as expenses that are reasonably likely into the future (such as surgery or ongoing physiotherapy). These expenses are also not restricted to out-of-pocket costs funded by the injured party directly. Repayments will also be made to Medicare and/or to private health providers who attend to the payment of injury-related expenses on the patient's behalf.

Reimbursement is also not restricted to traditional medical expenses such as consultations and medications. "Medical and like expenses" can also cover mobility aids, home and vehicle modifications, educational assistance, the cost of travel between medical appointments, and a variety of support services that someone may require following a major injury.

- *Genna Angelowitsch, Lawyer*

## What is a "significant injury"?

**There are restrictions imposed on injured people wanting to claim damages for pain and suffering from a negligent act. For people injured in public places or as a result of medical or dental negligence, the person must satisfy the Wrongs Act test of "significant injury".**

This is defined as:

- more than 5% permanent physical impairment
- more than 10% permanent psychiatric impairment
- loss of a breast
- loss a foetus.

We often need to gather the medical records of treating practitioners to help an independent medical examiner

determine if the injured person meets this threshold.

Some practical examples from our cases are:

### YES to Significant Injury

- Scarring to a young child's face
- Neck injury, with radicular symptoms in to the arm and regular headaches
- L4/L5 disc prolapse, requiring surgery, with some mild scarring at the surgical site (NB the impairment assessment must be done after the surgery)
- Loss of a kidney
- Colles fracture, with ongoing limitation of movement in the wrist

### NO to Significant Injury

- Right shoulder supraspinatus tear, treated surgically and post operative full range of movement
- Lower back injury, with disc prolapse, but no radiculopathy
- Significant scarring on a lower leg, but does not interfere daily activities
- Right hand injury following a severe cut with nerve and tendon damage but good recovery post surgery and rehabilitation
- Severe injury to the little finger, where there was no other injury to any part of the hand or body.

We are very grateful for the guidance we obtain from medical specialists who are trained in the AMA Guides and can assess our clients to determine if they meet the threshold.

# Vexing questions

## Why do food poisoning claims rarely attract compensation?

If your patient has suffered from food poisoning they can only sue for pain and suffering if they are left with a permanent significant injury. Compensation is unfortunately not available in the majority of food poisoning cases because it rarely leaves any lasting effects.

It is only if the person affected is left with a significant injury, as outlined in Andrea Tsalamandris' article, that they have the right to claim compensation for their pain and suffering. They have three years to make this claim.

If your patient does not have a significant injury but they know the source of the food poisoning and they feel aggrieved, they can write a letter asking for reimbursement of their out-of-pocket expenses, earnings lost and the value of any gratuitous care they received.

If they decide to do this, they should not sign anything which says they have finalised their entitlement.

They should continue to seek treatment for their injury and to discuss its cause with their doctors.

A patient with a permanent injury can call our Adviceline (1300 MYINJURY) to find out whether we can help them make a claim for compensation.



- Sarah Thorn,  
Lawyer

## Could I be sued if I help someone as a good samaritan?

No. The law in Victoria protects people who help (for no fee) at the scene of an accident or emergency, to assist someone who has suffered an injury or is at risk of death or injury.

The law also protects the actions of volunteers undertaking work, in good faith, for a community organisation. Liability for acts of the volunteer attaches to the community organisation.

## Can I say sorry?

Yes. Apologising to someone for an injury they have suffered does not constitute an admission of negligence. This applies to apologies made either in writing or verbally. But any information contained in the apology can still be used to establish a fact in the case.

So, if appropriate, you can say 'sorry', but don't say 'sorry, it's all my fault because ...'



## Can an injured person bring a public liability claim against a private individual?

The fact that a wrongdoer does not have an insurer standing behind them does not present a legal impediment to bringing a public liability claim. It does, however, often present a serious practical impediment.

Common assaults, sexual assaults, dog attacks and injuries occurring at private residences are common scenarios where there may be no insurer to pay compensation to an injured person.

The prospect of obtaining a 'hollow victory' – where compensation is awarded by a court but it is practically impossible to extract the compensation money from the wrongdoer – must be borne in mind when assessing the viability of pursuing a public liability claim.

It is important to check whether the person's home and contents insurer covers them for personal liability. In the absence of insurance, it is less likely compensation will be recovered from the private individual.

# Doctor Q&A

This editions' questions relate to medical expenses in public liability claims

**Q:** My patient needs surgery but does not have private health insurance. Can you get the Defendant to pay for the surgery upfront so my patient does not have to go on the public wait list?

Unfortunately this rarely happens. Most insurers will not offer a partial payment for an injury. This often means the patient either has to pay for the surgery themselves or wait for it to be done publicly. We cannot resolve the claim until the surgery has been done and the outcome known. As soon as the patient has recovered we then try and resolve the case as quickly as possible.

**Q:** What happens if there is private insurance?

We contact the private health fund (and Medicare) to identify all the medical expenses which relate to the injury. We then claim these and pay them back if the case is successful. We also claim the patient's out of pocket expenses for all medical treatment, including medication, dressings, home equipment etc.

If you have any legal questions about public liability claims, please contact our lawyers on (03) 9321 9900 for a confidential discussion.

## Doctor Q&A: Join us for lunch

We can host lunch time Q&A sessions at your clinic. This is a great opportunity to meet our team of lawyers and ask us any questions you have on personal injury law - how it affects your patients and what role you play in their claim. Or we can do a formal training session on WorkCover and TAC claims. You can pick the topic!

**Please contact us on  
03 9321 9900 to express  
your interest.**

## Our news

### Adviceline team recognised amongst Best Lawyers in Australia

Andrea Tsalamandris has been named the Melbourne Personal Injury Litigation 'Lawyer of the Year' in the eighth edition of Best Lawyers® in Australia. Only a single lawyer in each practice area and each community is given this award.

Michael Lombard has been named as a Best Lawyer in the area of personal injury litigation. This is the second time that both Andrea and Michael have been listing in the publication. Best Lawyers® is the world's oldest and most respected peer review of lawyers. It is a annual list published in almost 70 countries.



**Above:** Adviceline's Deidre Petrakis enjoying the day with local MP Andrew Giles and his children Daniel and Alice.

### Whittlesea Festival

As part of our ongoing commitment to the communities we are located in, we had a stall at the Whittlesea community festival. Deidre Petrakis and Lauren Freeman from our Epping office spent the day meeting local people, answering some legal questions and most importantly handing out balloons and lollypops to the children!

### Lauren Freeman promoted to Senior Associate

Congratulations to Lauren Freeman who was promoted to Senior Associate on 1 July 2015. It has been a big year for Lauren as she was also married in April.

Lauren is a fifth year lawyer who specialises in WorkCover claims. She strives to ease the burden of complex and stressful compensation schemes for her clients by providing advice and support every step of the way. Lauren works predominantly in our Epping office and also travels frequently to North East Victoria to see clients in the area where she grew up.



## VISIT US

### Epping

Shop 110B  
Pacific Epping  
(cnr High and Cooper Street)  
Epping VIC 3076

### Melbourne

Ground Floor, 555 Bourke Street  
Melbourne VIC 3000

### Melton

85 Unitt Street  
Melton VIC 3337

### Moe

Level 1, 18-20 Kirk Street  
Moe VIC 3825

### Springvale

369C Springvale Road  
Springvale VIC 3171

## CONTACT US

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